In The

Supreme Court of the United States

October Term, 1975

No. 75-897

EUGENE ENSLEN,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Petitioner was tried and convicted of a violation of N.C. G.S. 14-177, crime against nature. Upon appeal to the North Carolina Court of Appeals, that court found "no error" in the trial and conviction. This decision is reported at 25 NC App 662, 214 SE 2d 218 (1975). Petitioner then filed notice of appeal to the North Carolina Supreme Court and also petitioned that court for a writ of certiorari to the North Carolina Court of Appeals. The North Carolina Supreme Court dismissed the appeal for lack of a substantial constitutional question and denied the petition for writ of certiorari. This decision is reported at 288 NC 245, ...SE 2d.... (1975).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. WHETHER NORTH CAROLINA GENERAL STATUTE 14-177, UNDER THE FACTS OF THIS CASE, VIOLATES ANY CONSTITUTIONAL RIGHT OF PRIVACY?
2. WHETHER NORTH CAROLINA GENERAL STATUTE 14-177 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?
3. WHETHER NORTH CAROLINA GENERAL STATUTE 14-177 IS SO VAGUE THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?
4. WHETHER THE ALLEGED ARBITRARY ENFORCEMENT OF NORTH CAROLINA GENERAL STATUTE 14-177 DEPRIVED PETITIONER OF RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT?

STATEMENT OF THE CASE

On September 23, 1974, the petitioner, Eugene Enslin, was tried in the Superior Court of Onslow County before the Honorable John Webb, Superior Court Judge, and a jury upon an indictment charging him with the "abominable and detestable crime against nature." Upon a finding of guilty as charged and judgment of the trial court that the defendant be confined in the State's prisons for a term of one year, the defendant appealed to the North Carolina Court of Appeals. That court, in an opinion reported at 25 NC App 662, 214 SE 2d 318 (1975), found "no error" in the trial and conviction of petitioner. The Supreme Court of North Carolina dismissed petitioner's appeal for lack of a substantial constitutional question and denied a petition for writ of certiorari. This decision is reported at 288 NC 245, ... SE 2d.... (1975).

RELEVANT FACTS

Petitioner, Eugene Enslin, owns and operates a massage parlor and pornographic bookstore in adjoining buildings in Jacksonville, North Carolina. On June 7, 1974, Herbert P. Morgan, a seventeen year old member of the United States Marine Corp stationed at nearby Camp Lejeune, visited the bookstore at the request of Detective Sam Hudson of the Jacksonville Police Department. Morgan's purpose in visiting the bookstore was to give petitioner an opportunity to solicit Morgan's participation in an act of fellatio.

Upon entering the bookstore, Morgan asked a clerk if he could speak with petitioner. The clerk replied that petitioner was out of the store but would soon be back. Two or three minutes later, petitioner approached Morgan and stated, "I hear you are looking for me." Morgan asked if they could speak in private. Morgan and petitioner then went outside the bookstore and Morgan advised petitioner that he was just out of boot camp and was looking for a "a little excitement." Petitioner advised Morgan that the girls in the massage parlor did not provide that "excitement," but that he could if Morgan would first get a massage.

Morgan advised petitioner that he had to go somewhere but would be back in a few minutes. Morgan left the bookstore and went to talk with Detective Hudson who was waiting in a nearby field. Morgan advised Hudson of his conversation with the petitioner. Hudson then asked Morgan to return to the bookstore.

Morgan returned to the bookstore and discovered that petitioner was not there. Morgan then went into the adjoining massage parlor and asked for petitioner. A woman in the massage parlor advised Morgan that petitioner was out to supper but would be back soon. Morgan asked if he could have a massage while he was waiting. The woman replied that he could, but upon determining that Morgan was less than eighteen years of age refused to give him a massage. Some fifteen to twenty minutes later, petitioner came into the massage parlor and Morgan informed him that he could not

get a massage because of his age. Peitioner then informed Morgan that he could still give him the "excitement" he was looking for without the purchase of a massage. Morgan and petitioner went into the bookstore. Petitioner carried him into an area containing "peep shows" and then through a door into the back room of the bookstore. The room contained a sink, a bed, a bureau and a movie projector and screen. Petitioner turned on the projector, which was showing a pornographic movie, and asked Morgan to get undressed and lie on the bed. Petitioner then undressed, got on the bed with Morgan and performed an act of fellatio upon Morgan.

REASONS FOR DENYING THE WRIT

I. CRIMINAL PROSECUTION OF THIS PETITIONER DID NOT INVADE ANY CONSTITUTIONAL RIGHT OF PRIVACY.

Petitioner argues that criminal prosecution for private acts of fellatio between consenting male adults is a violation of the right of privacy as guaranteed by the First, Third, Fourth, Ninth and Fourteenth Amendments to the United States Consitution. In support of this argument, petitioner relies upon *Griswold v. Connecticut*, 281 US 479, 14 L Ed 2d 510, 85 S Ct. 1678 (1965); *Eisenstadt v. Baird*, 405 US 438, 31 L Ed 2d 349, 92 S Ct 1029 (1972); and *Roe v. Wade*, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973).

According to petitioner, this is simply a case of consenting adults being criminally prosecuted for sexual acts occurring in the privacy of a home. An examination of the facts undercuts this simple characterization. From the record of the case, it clearly appears that this case concerns the criminal prosecution of an adult for the blatant and open pandering and solicitation of an act of fellatio with a seventeen year old[1], who had earlier

[1] At page 4 of the Petition it is stated that the age of consent in North Carolina is seventeen. Respondent is not aware of any statutory or case law in the State of North Carolina setting the age of consent for acts of sodomy or other related acts at seventeen.

been denied a massage by petitioner's own employees because of his age. The act of fellatio did not occur in a home or motel room; it occurred in the back room of a pornographic bookstore apparently during the regular hours of operation of the store. Thus, the question raised by petitioner is not reached in this case. Indeed, it would appear that the question raised by petitioner would not arise in this jurisdiction. Respondent is not aware of any case from this jurisdiction involving the criminal prosecution of consenting adults, married or unmarried, for sexual acts occurring in the privacy of a home.

Furthermore, even if the facts of this case can be construed as raising the issue of the right of consenting adults to engage in sexual acts in private, it is clear that the decision of the North Carolina courts is consistent with two earlier opinions of this Court. *Canfield v. State*, 506 P 2d 987 (Okla 1973) app. dism. 414 US 991, 38 L Ed 2d 230, 94 S Ct 342 (1973), reh. den. 414 US 1138, 38 L Ed 2d 763, 94 S Ct 884 (1974). *Pruett v. State*, 463 SW 2d 191 (Tex 1970), app. dism. 402 US 902, 28 L Ed 2d 643, 91 S Ct 1601 (1971), reh. den. 403 US 912, 29 L Ed 2d 690, 91 S Ct 2203 (1971).

Both these cases concerned convictions under crime against nature statutes in which it was argued that private sexual acts between consenting adults are protected by the right of privacy. In both cases, the appeals to this Court were dismissed because of lack of a substantial constitutional question. Such a dismissal is a decision upon the merits. *Hicks v. Miranda*, 422 US 332, 45 L Ed 2d 223, 95 S Ct 2281 (1975). For other cases rejecting arguments that private sexual acts between consenting adults are protected by the right of privacy see: *State v. Lair*, 301 A 2d 748, (NJ 1973); *Hughes v. State*, 287 A 2d 299 (Md 1972) cert. den. 409 US 1025, 34 L Ed 2d 317, 93 S Ct 469; *Dixon v. State*, 268 NE 2d 84 (Ind 1971); *People v. Roberts*, 256 Cal App 488, 64 Cal Rptr 70 (1967); and *People v. Drolet*, 30 Cal App 3rd 207, 105 Cal Rptr 824 (1973).

Most recently, an identical attack upon Virginia's crime

against nature statute was rejected by a three-judge court in *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199 (ED Va 1975), U. S. appeal pending.

Respondent submits that the police power of the states clearly extends to prohibit actions such as that of petitioner and that such actions are not protected by the right of privacy. If criminal sanctions for actions such as those of petitioner are to be removed, it is a decision for the legislatures of the states and not this Court.

II. N.C.G.S. 14-177 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner argues that N.C.G.S. 14-177 denies to him and all other homosexuals equal protection of the law because it singles out homosexuals and prohibits their enjoyment of sex.

The entire premise of this argument is without support. N.C.G.S. 14-177 is not limited to acts of homosexuals. "The crime against nature is sexual intercourse contrary to the order of nature, and in this jurisdiction embraces the offense of sodomy, beastiality and buggery, as those offenses were known at common law." *State v. Harward*, 264 NC 746, 142 SE 2d 691 (1965); *State v. O'Keefe*, 263 NC 53, 138 SE 2d 767 (1964), cert. den. 380 US 985, 14 L Ed 2d 277, 85 S Ct 1355 (1965). Furthermore, petitioner has not cited, nor can he cite, any case from this jurisdiction in which homosexuals were prosecuted for sexual acts occurring in the privacy of their homes.

Arguments that sodomy statutes constitute a denial of equal protection of the laws because they discriminate against homosexuals have been advanced before and rejected. See *State v. Lair, supra; People v. Vasquez*, 197 NW 2d 840 (Mich 1972); *Daniels v. State*, 205 A 2d 295 (Md 1964).

Arguments have also been advanced in the past that statutes such as N.C.G.S. 14-177 deny equal protection of the law because they discriminate on the basis of material status. These

arguments have been rejected. *State v. Lair, supra; Hughes v. State, supra;* and *Raphael v. Hogan*, 305 F Supp 749 (DC NY 1969). In *Hughes v. State*, the court, in addressing this question, said:

> "The rationale of the *Griswold* holding flows from its eulogy of the marital status and lacking such status the rule has no foundation. In such circumstances, we see no insidious discrimination between married individuals and unmarried individuals so as to deny equal protection of the laws in any event." 287 A 2d 305.

III. N.C.G.S. 14-177 IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioner's argument that N.C.G.S. 14-177 is unconstitutionally vague has clearly been rejected by this Court. In *Wainwright v. Stone*, 414 US 1, 38 L Ed 2d 179, 94 S Ct 190 (1973), this Court held a Florida statute very similar to N.C.G.S. 14-177 not to be void for vagueness. Most recently, a similar statute from Tennessee passed constitutional muster. *Rose v. Locke*, — US —, 46 L Ed 2d 185, 96 S Ct 243 (1975). See also: *Phillips v. North Carolina*, 234 F Supp 333 (WD NC 1964). Respondent would note that N.C.G.S. 14-177 has been construed by the North Carolina courts as including acts *per os* as well as acts *per anum*. *State v. Fenner*, 166 NC 247, 80 SE 970 (1914).

IV. PETITIONER HAS NOT SHOWN THAT HIS CONVICTION WAS THE PRODUCT OF ERRATIC AND ARBITRARY ENFORCEMENT OF THE LAW.

Petitioner argues that N.C.G.S. 14-177 is so arbitrary and erratically enforced as to deny him equal protection of the laws.

A heavy burden must be shouldered by petitioner before he can prove discriminatory or erratic and arbitrary enforcement of a statute prohibiting crime against nature. *U. S. v. Cozart*, 321 A 2d 342 (DC 1974). Petitioner cannot carry that burden.

In an attempt to carry this burden, petitioner relies primarily upon the testimony of Detective Sam Hudson of the Jacksonville Police Department that he was "out to get" petitioner. Petitioner takes this statement of Detective Hudson out of context. Counsel for petitioner asked Detective Hudson what he meant by this statement. Detective Hudson stated:

> "I have advised him [petitioner] if he did not stop this illegal movements that I was going to have to get him; yes, sir. I advised him that I had been looking for the right man that I could send in; yes, sir." (Record, p. 18)

The effect of this statement is that Dective Hudson was aware of the illegal activities of the petitioner and that he would arrest petitioner if these activities were not stopped. Such a statement by a law enforcement officer is certainly proper. Energetic law enforcement surely does not show erratic, arbitrary or discriminatory enforcement of the law.

There is evidence in this case that Detective Hudson was aware of three or four other homosexuals in Jacksonville and that those individuals had never been arrested. There is no evidence whatsoever, however, that Detective Hudson had any evidence to indicate that these other homosexuals were engaging in actions similar to the actions of petitioner. This evidence clearly rebuts any allegation of the erratic, arbitrary or discriminatory enforcement of N.C.G.S. 14-177 and tends to indicate that only homosexuals engaging in the open pandering and solicitation of acts of fellatio are subjected to criminal prosecution.

CONCLUSION

For the foregoing reasons the State of North Carolina respectfully submits that the writ of certiorari must be denied.

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